satisfied that the statements were not made without coercion or threat.

When the prosecution closed their case, I find no evidence at all to link the accused with the cultivation of the ganja plants or with the exhibits. The only evidence is the evidence of PW11. In his evidence, PW11 said 'at that time I did press Kamde, I pressed Kamde because he (meaning the police) asked me to do so. At that time I was too scared. If he asked me to eat shit, I would do so'. That is the only evidence. Assuming that PW11 was not under pressure to give the evidence, the court has to bear in mind that PW11 was found and arrested at the scene, and he is, therefore, an accomplice. His evidence is not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused.

The learned deputy, in her submission, said that the prosecution was relying on circumstantial evidence in the present case. She said that after Sumari was arrested, he pointed at the accused's house, and there was also the close proximity between the accused's 'kebun' and the place where the ganja was planted. But in law, in order for the prosecution to succeed their case on the basis of circumstantial evidence, the prosecution must adduce circumstantial evidence which points to the guilt of the accused. In this case, there is no such evidence.

The learned deputy relying on the case of *Haw Tua Tau* v *PP* [5] rightly pointed out to the court that the prosecution, at the close of their case, need not prove the case beyond reasonable doubt. All they need to show is that there is some credible evidence to link the accused with the offence he is charged with. She has stated the law correctly. According to *Haw Tua Tau*,[5] there must be some evidence which is not inherently incredible. The important word is 'some evidence'. In this case there is no evidence at all to link the accused with the cultivation of ganja or with the exhibits. I, therefore, find no prima facie case against the accused. He is acquitted and discharged.

Order accordingly.

Solicitors: *RK Menon & Co.*

Reported by *PS Ranjan*

Public Prosecutor v Chong Boo See

HIGH COURT (PENANG) – CRIMINAL TRIAL NO 58-9-83
EDGAR JOSEPH JR J
5 NOVEMBER 1987

Criminal Procedure – Cautioned statement – Admissibility – Confession – Corroboration – Duty of counsel at end of prosecution case – Defence of accused – Criminal Procedure Code (FMS Cap 6), ss 73(b), 180, 182, 190, 197, 214(i) & 217

Criminal Law – Dangerous drugs – Trafficking in – Whether accused had possession of drugs – Cautioned statement – Dangerous Drugs Act 1952, ss 37(1)(a)(ii), 37A(i), 39A & 39B

The accused was charged with trafficking in dangerous drugs, ie morphine. The police raided a dwelling house where they arrested the accused. The police broke into the house when the accused would not let them in. The accused was then seen running out of the toilet where there was a fire. The police recovered two morphine blocks and partly burnt Chinese newspapers. A paper package containing a white powdery substance which was later identified as sodium bicarbonate, a substance which could be used for the purpose of converting morphine into heroin, was also recovered. At the trial, a trial within a trial was held to determine the admissibility of a cautioned statement. The cautioned statement was admitted and in it the accused stated that he was alone at the time of the police raid and that he had attempted to burn the morphine blocks when the police indicated that they wished to enter the house. The accused was called for his defence and in his defence he stated that he had told the police to wait while he looked for the key to open the house. The accused claimed that he had no knowledge of the two morphine blocks. Before the police entered the house, he claimed there was another man in the house who ran out of the house and escaped. The accused said he had gone to the toilet as he saw smoke coming from it.

Held, convicting the accused: (1) The onus was on the prosecution to prove the voluntariness of the cautioned statement beyond reasonable doubt. In this case the court was satisfied that the witnesses called by the prosecution during the trial within a trial were witnesses of truth. There were no grounds sufficient to persuade the court to exclude the cautioned statement.

(2) Although in principle it is possible for an accused person to be convicted on his confession standing alone provided the court is of the opinion that the incriminating parts thereof are true, in practice the court always looks for corroboration. In this case there was corroboration of the cautioned statement of the most cogent kind implicating the accused.

(3) At the close of the prosecution case, the court was of the opinion that the prosecution had tendered sufficient evidence which if unrebutted would have warranted the conviction of the accused under s 182(f) of the Criminal Procedure Code, and therefore indicated that the court did not wish to hear a submission of no case to answer. Nevertheless counsel for the accused formally submitted that there was no case to answer.

(4) The prosecution had adduced sufficient evidence which if unrebutted would warrant a conviction, irrespective of whether it was open to the court to assess the credibility of the prosecution witnesses at the close of the case for the prosecution.

(5) The presumption that the accused was a trafficker applied as the accused had in his possession morphine which was in excess of the statutory minimum of 200g then provided for in s 37(1)(da)(ii) of the Dangerous Drugs Act 1952. The onus was on the accused to rebut the presumption.

(6) Far from rebutting the presumption of trafficking under s 37(1)(da), the explanation given by the accused in this case reinforced it. The accused was therefore convicted and in view of the quantity of the drugs involved, he was sentenced to death.

Cases referred to

1 *Ibrahim* v *The King* [1914] AC 599 (follld)
2 *Noor Mohamed* v *The King* [1949] AC 182 (refd)
3 *PP* v *Lai Pong Yuen* [1968] 1 MLJ 12 (follld)
4 *R* v *Baskerville* [1916] 2 KB 658 (follld)
5 *PP* v *H Parnaby* [1953] MLJ 163 (not follld)
6 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (follld)
7 *PP* v *Chin Yoke* [1940] MLJ 47 (refd)
8 *PP* v *Lim Teong Seng & Ors* [1946] MLJ 108 (refd)
9 *Zahari bin Yeop Baai* v *PP* [1980] 1 MLJ 160 (refd)
10 *A Ragunathan* v *PP* [1982] 1 MLJ 139 (refd)
11 *Munusamy* v *PP* [1987] 1 MLJ 492 (follld)
12 *Muniandy* v *PP* [1966] 1 MLJ 257 (follld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 73(b), 180, 182, 190, 197, 214(i), 217
Dangerous Drugs Act 1952 ss 37(1)(a)(ii), 37A(i), 39A, 3B.

Josephine Premla Sivaretnam (Deputy Public Prosecutor) for the Public Prosecutor.
V Sithambaram for the accused.

Cur Adv Vult

Edgar Joseph Jr J: This accused was prosecuted before me on the following amended charge:

> That you, on the 5th day of January, 1983 at about 6.15 am at house No 57, Lorong Binjai 7, Taman Sri Rambai, Bukit Mertajam, in the district of Bukit Mertajam, in the State of Pulau Pinang, did on your own behalf traffic in dangerous drugs to wit, morphine weighing 2,213g in contravention of the provisions of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952 and that you have thereby committed an offence punishable under s 39B of the same Act.

According to the evidence led by the prosecution, Chief Inspector Lai Kim Eng (PW1) who was attached to the secret societies section of the district police station, Bukit Mertajam, acting on information which he had received at about 6 am on 5 January 1983, led a party of seven police personnel, consisting of Inspector Chan Chun Voon (PW4) and six members of the rank and file, to a dwelling house known as 57, Lorong Binjai 7, Taman Sri Rambai, Bukit Mertajam, being an end single-storey terrace house with a fence, metal grill and wooden door ('the house'), arriving there at about 6.15 am the same day. The party then split into two groups: one group led by Inspector Lai accompanied by Constables Saad bin Hanapi and Osman bin Ariffin proceeded to the front of the house while the other group led by Inspector Chan accompanied by Constables Omar bin Yunus, Quek Gaik Meng and Ahmad bin Ali proceeded to the rear of the house.

Inspector Lai attempted to gain entry through the main entrance but found that the grill and front door were locked, so he shook the grill and called out to whoever was in to open the door. After a short while, he saw a male Chinese open the wooden door. As soon as the latter did so, Inspector Lai took out his authority card, identified himself and asked that the door be opened for purposes of an inspection. The male Chinese responded by quickly closing the door and locking it. Inspector Lai raised his voice and demanded that the door be opened. At this point of time, Inspector Lai heard Inspector Chan saying in a loud voice that there was something burning in the toilet. Inspector Lai then, assisted by his men, forcibly pulled the grill causing it to give way. They did the same to the wooden door until it too gave way and so managed to gain entry into the house.

Inspector Lai, who was closely followed by his men, rushed into the hall and then into the dining room at which point he noticed the same male Chinese (who he identified as the accused) running out of the toilet towards him. Inspector Lai caught hold of him, handed him over to his two men and rushed to the toilet where he found a heap of newspapers in flames. So he immediately went into the bathroom, next to the toilet, got a pail of water and doused the flames. By this time, the other group led by Inspector Chan had entered the house.

Inspector Lai then inspected the toilet, and found there two blocks, which looked like bricks and were whitish in colour, one on top of the other, near the top right hand corner, which were later identified by the chemist. Near them were some ash and some partly burnt Chinese newspapers. He identified the two blocks, being exh P7 and P8, in court without the slightest difficulty which was understandable as he had soon after their recovery signed and dated them in the house. They also had rather distinctive markings as they each bore the numbers E1 and E2. He also identified a set of photographs, being exh P1A-F, taken about one hour after the raid by the police photographer as photographs of the outside and the inside of the house including the toilet, showing the two bricks in situ. He also identified the partly burnt Chinese newspapers as exh X1. On continuing his search, he also recovered, in the dining hall, a paper package about three feet high placed just next to the wall bearing the words 'Port Klang Soda Light', containing a white powdery substance, being exh P10, which the chemist later identified as sodium bicarbonate, a substance which could be used for the purpose of converting morphine into heroin. On conducting a further search, in the presence of the accused, he found no one else. Soon after the arrest and the

recoveries aforesaid, while still in the house, Inspector Lai telephoned the investigating officer, ASP Lim Poh Bok, informing the latter of the events that had transpired and in less than one hour – it was then about 7 am – ASP Lim arrived. Inspector Lai handed over the accused and all the exhibits recovered to ASP Lim who then departed for the Bukit Mertajam police station taking with him the accused and the exhibits.

Cross-examination of this witness was aimed at establishing:

(a) that when the accused opened the front door to the house, he told Inspector Lai that he was going to fetch the key;
(b) that the accused never shut the door in the face of Inspector Lai;
(c) that Inspector Lai waited five minutes before forcing his way into the house, thus suggesting that he was waiting for the accused to fetch the key to the grill;
(d) that as soon as Inspector Lai entered the house he saw the accused standing in the dining room and it was there that he arrested the accused. In other words, there was no question of the accused running from the direction of the toilet when he was stopped and arrested.

Inspector Lai vehemently denied each and every one of the above suggestions and adhered to what he had said in examination-in-chief.

To emphasize point (d), counsel drew the admission from Inspector Lai that neither in his report (exh P12) nor in his statement to the police did he mention the fact that he saw the accused run from the direction of the toilet towards him.

Further cross-examination was aimed at establishing the following point: that at the time the police struck, there was another person in the house, named Ah Hock, who was the sole possessor of the morphine blocks P7 and P8 and who managed to make good his escape through an air well in the house and that having arrested only the accused, the police party were determined to fasten him with sole responsibility for the offence.

Indeed, this was the main thrust of the cross-examination throughout the entire prosecution case. In furtherance of this objective, counsel for the defence drew the fact from Inspector Lai that Inspector Chan had, during the raid, gone through the ceiling of the second bedroom and examined the area between the ceiling and the roof to see if there was anyone or anything incriminating there but without result. It was suggested that the reason why Inspector Chan did this was to see if Ah Hock was hiding there, but the suggestion was denied; the explanation being that it was a routine precautionary step to ensure that nobody was concealed there when they saw that a trap door in the ceiling was not completely closed.

It was further put to Inspector Lai that while in the house, the accused had pointed to the air well whereupon Inspector Lai slapped and punched the accused twice which caused the latter to fall to the ground where he was kicked by the other police personnel. Inspector Lai denied that anything of the sort had happened. He said that as soon as he stopped the accused and caught hold of him, he had handed over the accused to Constables Saad and Osman who then handcuffed the accused and detained him in the hall. He was corroborated as regards this part of his evidence by Constable Saad who also confirmed that there had been no assault.

Inspector Lai was also cross-examined about the permanent features and contents of the house. He said it was a three-bedroom house and that he found two mattresses on the floor in the first bedroom and a bed in the second bedroom. But he could not remember if there was a mattress in the hall. The third bedroom was, however, vacant. Nor could he remember if there was a television set or radio or sofa in the hall. Similarly, he could not remember if there was any clothing in the first bedroom or the second bedroom or anywhere else in the house. In answer to the court, he said that as far as he could see there was no kitchen in the house. Nor could he remember if he saw food or cooking utensils or a fridge or a cooker in the house.

Cross-examined further by counsel for the defence, he said that he could not remember if there was a ladder in the house.

Cross-examination then turned to the background of the witness. He said he had been in the force for 32 years and had risen from the rank of police constable to sergeant major, then to probationary inspector on June 1975 and eventually to his present rank of chief inspector. After his training at the police depot and police college, he was transferred to the district police station, Bukit Mertajam, in December 1975. Since then, for about five years, he had been engaged in CID work and then in anti-secret societies work. He had also been a prosecuting officer for about four years.

In re-examination, he said he had checked the back door of the house and found it bolted from the inside. He said that the report he had made was intended to cover the arrest of the accused and the recovery of the exhibits. The following day, ASP Lim, the investigating officer, had recorded a statement from him. He added that it does happen that when making a statement one forgets certain things. This, he said, was his first and only drug trafficking case.

He could not recall what he did that day after making his report and he did not know where the accused was being held that day following the time he had handed over the accused to ASP Lim. But he confirmed that the

lock-up in the Bukit Mertajam police station was on the ground floor and his own office was on the first floor.

He was emphatic that he took no part in the interrogation of the accused nor was he present when the accused was being interrogated. He denied having ever assaulted the accused but admitted that when he stopped the accused in the house, he had used some force to do so; it was, he said, 'rather like a rugby tackle'.

The next witness whose testimony I should like to refer to is that of Inspector Chan who, it will be recalled, led the other group of police personnel consisting of Corporal Quek, Corporal Omar, Corporal Ho and Police Constable Ahmad to the rear of the house. He explained that Police Constable Ho stood at the corner of the fencing at the back of the house, in the middle of a tarred lane, about ten feet from him while Constable Ahmad stood near his (Inspector Chan's) car which was parked by the side of the house. He also mentioned that the back door had a metal grill and so too had the windows. He added that it was not possible for anyone to escape through the windows with his bare hands.

He further explained that he and his men had positioned themselves at the back of the house to prevent anyone from escaping through the back door.

He then turned to specific matters. He said he had seen some smoke coming out of a ventilation window at the rear of the house. So, he shouted out in Cantonese and Malay, 'Someone is burning something inside – faster, faster.' However, he still remained at his position. But, a little later, he heard the sound of a person moving in the house. So he and Corporal Quek proceeded to the front of the house and entered the house through the front door but the rest of his group remained at their positions.

On entering the house, he saw a male Chinese in handcuffs in the hall who he identified as the accused. He noticed that Detective Corporal Saad was standing guard over the accused.

He then proceeded to the rear of the house and, on looking into the toilet, he saw some burnt paper and two blocks which looked like P7 and P8.

He then returned to the front of the house and, with Inspector Lai, he conducted a room by room search of the house.

In the dining hall, he said he saw the sack, P10, but did not examine its contents.

He confirmed that on entering the second bedroom, he saw, close to the bedroom door, a hole 1 in by 1½ in in the ceiling which was about ten feet high. So, with the aid of a stool and with one foot on the door knob, he reached the ceiling beam with his hand. In that way, he pulled himself up; the top half of his body was thus above the ceiling and, with a torch light, he examined the area between the top of the ceiling and the roof but found nobody there or anything incriminating. He also saw that there was a continuous party wall separating the house from the house immediately next to it.

I shall now turn to the highlights of the cross-examination of this witness.

He was asked when it was that he last saw the house and, after some hesitation, he said it was the night before. Asked by the court as to the reason for his pausing for a while before answering what was after all a simple question, he frankly conceded that he may have panicked.

Cross-examination then resumed and he said that he went again to the house 'to concentrate on the second bedroom' and also to look up the air well and noted that it had a metal grill. He was accompanied by the investigating officer, ASP Lim, who had, in fact, suggested that they visit the house again to enable him to demonstrate to ASP Lim how he had climbed through the ceiling of the second bedroom on 5 January 1983.

He was emphatic that the iron grill in the air well he had seen the night before was already existing at the time of the police raid on 5 January 1983 and that the sliding roof was shut. He denied asking the occupants of the house, during his visit that night, anything about the iron grill.

He was very sure that at the time of the police raid on 5 January 1983, there was no ladder in the air well of the house. He said he did not see any of his men go out to ensure if anyone had escaped from the house.

He denied that he had checked the area between the ceiling of the roof of the second bedroom and the air well because Inspector Lai had told him that Ah Hock had escaped from the house.

Under re-examination, he said that his recollection of what he saw when checking the area between the ceiling and the roof was that the space between the beams was not large enough for an adult person to pass through.

He confirmed that he had instructed his men to stop anyone escaping from the house but that he had not received any report from them about such escape.

He maintained that the first time he had heard of Ah Hock's name in connection with this case was when defence counsel raised it in court.

The next witness whose testimony is worthy of note is that of Constable Ahmad who, it will be recalled, was a member of the group led by Inspector Chan. This witness testified that on the instructions of Inspector Chan, he stood guard by the fence of the house to ensure that no one escaped from the house. He marked the spot on the

sketch, P2, with the letters 'ABA'. This spot was in a side lane. He said he had remained there from 6.15 am until 7 am. He further said that from where he stood, he could see tthe entire external side wall and roof of the house but saw no one escape from the house. To emphasize the point, he quickly added that nobody escaped from the house.

When ASP Lim, accompanied by the police photographer, arrived at the house, he entered the hall and it was then that he first saw the accused who was in handcuffs. ASP Lim added that he did not go to any other part of the house and later left with the rest of the police party.

Under cross-examination, Constable Ahmad was challenged as to his ability to see the entire roof of the house when he stood guard by the fence, but he stoutly maintained that he could, though he admitted he could not see the roofs of the other houses in the same row. He also said that he could see the air well of the house from where he stood, though he could not remember seeing the grill in the air well. He said he had been instructed by Inspector Chan to look at the roof of the house and the air well in particular.

Then, there was the testimony of DPC Ho who was a member of the group led by Inspector Chan. He said that he had taken up position about 20 feet from the back end of the fence shown in the sketch. He could not, however, mark his position in the sketch because the sketch did not show it. He added that he was guarding the back lane, the side lane and the rear portion of the roof of the house. He was emphatic that while he stood guard he did not notice anyone escape from the house. He said he left his position at about 7 am when he walked into the house using the front entrance. Later, he had left with the rest of the police party.

Under cross-examination, he said that from his position he could see the entire roof of the house and part of the air well. He also said that he could see the whole of the back portion of the roofs of the entire stretch of terrace houses. Then he said he could only see the back portion of the roof of the house. He was pressed in cross-examination on the apparent discrepancy when he explained that he was not stationary at his position and did in fact walk about. Eventually, however, when pressed further in cross-examination he said he could only see the back portion of the roof of the house.

Under re-examination, he confirmed that from where he was he could see the back portion of the house, the side of the house and also the back portion of the roof of the house and the air well. He added that he could have seen anyone escaping from the side of the house or the back portion of the roof. He maintained that while he was standing guard there, no one escaped from the side of the house or the back portion of the roof.

At this point, I must interrupt the sequence of events and turn to consider a separate matter; namely, the admissibility of a cautioned statement allegedly made by the accused, an issue which was vigorously contested by the defence. I accordingly directed a trial within a trial to determine this question of admissibility and this, as was to be expected, took up a great deal of time.

The point raised by the defence was that the cautioned statement was obtained from the accused as a result of assaults, threats, promises and inducements proceeding from persons in authority such as Inspector Lai and one Inspector Mohan, an officer then attached to the cawangan anti-dadah, Bukit Mertajam Police Station.

The defence also attacked the veracity of the recording officer, one ASP Yeoh Seng Huat; in particular, it was alleged that material and incriminating parts of the statement allegedly attributed to the accused were in fact never made by the accused; in other words, that they were a mere invention.

It was also alleged that no caution had been administered to the accused before the statement was recorded and not everything the accused said was taken down.

Furthermore, it was alleged that the accused and the recording officer could not have understood each other adequately because of language difficulties since the accused spoke partly in broken English and partly in Hokkien and the statement was taken down in English.

In support of its case for admissibility, the prosecution relied on the testimony of the recording officer, ASP Yeoh, Inspector Lai, Inspector Mohan, Detective Corporal Saad and ASP Lim. I took a full note of their evidence and I do not propose to recapitulate that evidence here. It is sufficient, if I say in general terms, that the aggregate effect of their evidence was to traverse the various allegations made by the defence.

The accused himself testified during the trial within a trial and alleged that:

(a) at the time of his arrest in the house he had been assaulted by Inspector Lai;

(b) later the same day, at the police station, Bukit Mertajam, before he was produced before the magistrate, Bukit Mertajam, he was again assaulted by Inspector Lai, Inspector Mohan and two or three other Malay detectives;

(c) Inspector Lai had promised him that if he (the accused) gave Inspector Lai correct information he would be let off;

(d) Inspector Lai had urged him to cooperate and to admit the offence otherwise he would suffer;

(e) Inspector Mohan had also asked him about the names of persons in the drug trade and the sources of drugs, that following replies to these questions Inspector Mohan slapped and punched him and pulled his hair.

He said this had happened twice both before and after he was produced before the magistrate on 5 January 1983;

(f) on the afternoon of 5 January 1983, at the police station at Bukit Mertajam, before ASP Yeoh recorded his cautioned statement, he was struck on the soles of his feet with wires by two or three police personnel;

(g) from the time of his arrest until his cautioned statement was recorded, he was not given food or drink;

(h) he had complained to ASP Yeoh that he had been assaulted;

(i) he had not been cautioned by ASP Yeoh before his statement was recorded;

(j) he spoke partly in English and partly in Hokkien when making the statement;

(k) the statement was never read back to him before he signed it;

(l) from time to time, during recording of his statement, he was ridiculed by ASP Yeoh who made comments like 'bluffing', 'lies', 'rubbish'.

After recording all the evidence, both for the prosecution and the defence, I heard submissions from both sides and reserved my decision until the next day to give my ruling.

The first issue before me was a simple one and it was this: upon the evidence, could it be said that 'it appeared' that the making of the statement had been caused by any inducement, threat, assault or promise having reference to the charge against the accused proceeding from a person in authority and sufficient in the opinion of the court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

In considering the above questions, I recognized that the onus was on the prosecution to prove voluntariness beyond all reasonable doubt and not for the defence to prove involuntariness: see *Ibrahim* v *The King*.[1] I was satisfied that the witnesses called by the prosecution during the trial within a trial were witnesses of truth. They were unshaken and unbroken despite lengthy cross-examination and I found nothing improbable in their testimony. On the other hand, there was not a scrap of evidence confirming the story of the accused; the first time he was making the allegations of wrongful conduct and impropriety against the police was in court although he had opportunities to do so earlier. I appreciated, of course, that confirmation of the accused's story, though it would have strengthened his case, was not legally necessary provided I regarded that story as reasonably probable. As it was, however, I rejected his allegations made during the trial within a trial as being false and untrue. I was accordingly completely satisfied that the statement was free and voluntary.

The second issue as regards this part of the case was whether the prosecution had proved the administration of the caution prescribed under the provisions of proviso (b) to s 37A(1) of the Dangerous Drugs Act 1952. I was satisfied upon the testimony of ASP Yeoh that he had administered the caution to the accused as required by law and that the accused understood it.

There was also a third issue and, it was this: accepting that the statement was admissible, should I, nevertheless, in the exercise of my discretion, have rejected it as being virtually worthless as evidence under the principles enunciated in *Noor Mohd* v *The King*,[2] having regard to the allegations that the statement was not a true and accurate record of what the accused had said, that there were language difficulties and, also, on the ground of alleged oppression caused by the accused not having had food or drink from the time of the arrest until he made his statement. After careful consideration, I was satisfied that there were no grounds whatsoever for me to exercise my discretion in favour of the defence. I accepted the testimony of ASP Yeoh that the accused had elected to speak English and that they understood each other sufficiently well and that the statement was a full, complete and accurate record of what the accused had said. I also accepted his evidence that the accused had not complained to him about any assaults by police personnel. Similarly, I accepted his evidence that he had not ridiculed or made any comments as alleged by the accused during the recording of the statement.

As for the accused not having had any food or drink from the time of his arrest until he made the cautioned statement, it should be recognized that whether or not this would have sapped his will to resist or so undermined him physically or mentally as to cause his will power to crumble and thus to speak when otherwise he would have remained silent, would depend upon subjective considerations such as his age, health, sex and personality. In this case, I was concerned with a man 27 years of age, still in the prime of his life and, apparently, in good health for it was never suggested that he was an invalid. He struck me, when he gave evidence, during the trial within a trial, as being a very composed individual with a strong personality, of slightly above average intelligence and mental alertness, having regard to his station in life, for his answers whether in examination-in-chief or in cross-examination were always relevant, precise and fluent. He was also not an educated man for he was a form two drop-out from an English medium school. I would add that my recollection of the evidence was that he never alleged that his not having had food or drink had so undermined him physically or mentally as to have had a material bearing on his willingness to make the cautioned statement. Certainly, there was no evidence that he had asked for refreshments at the material time.

In all the circumstances, I was satisfied that there were no grounds sufficient to persuade me that I should,

in the exercise of my discretion, exclude the cautioned statement.

Having admitted the cautioned statement, it was duly marked as an exhibit, being P15. A perusal of the cautioned statement showed that it was highly incriminatory for in it the accused had admitted that on 1 January 1983 – that is to say some four days before the police raid – he had two visitors, one of whom was Ah Hock. The latter brought with him the two blocks of morphine (exhs P7 and P8) which, it will be recalled, was the subject matter of the charge and handed them to the accused with a request that the accused keep them for him. The accused admitted that he did so. Both Ah Hock and the other man then departed, leaving the two blocks of morphine with the accused.

The accused then dealt with events at the time of the police raid and soon afterwards. He admitted that he was alone in the house (of which incidentally, he was the sole tenant) at the time the police struck. On hearing the knock on the door, he got up and opened the door only to find the police – who had duly identified themselves – standing there and wishing to gain entry to make a search. The accused said that he then immediately shut the door and having got some newspapers and matches made a beeline for the toilet where the two blocks of morphine were and then proceeded to try and burn them as he knew they were illegal merchandise though, it would appear, he did not know – so he seemed to imply – that they were dangerous drugs of any sort.

It is unnecessary to delve into the details of the cautioned statement but I would like to make three comments about it.

In the first place, counsel had quite rightly, I thought, taken the point that a certain part of the cautioned statement which reads:

> Q: On how many occasions you have kept these things for 'Ah Hock'?
>
> A: On about seven to eight times since June 1982.

should be disregarded as being irrelevant to the charge, gravely prejudicial and therefore inadmissible. I accordingly excluded it altogether from my consideration.

In the second place, it is trite law, as Ismail Khan J (as he then was) said in *PP* v *Lai Pong Yin*,[3] that although in principle it is possible for an accused person to be convicted on his confession standing alone provided – I hasten to add – the court is of the opinion that the incriminating parts thereof are true, in practice it always looks for corroboration.

In the third place, a perusal of the cautioned statement in this case shows that it contained detailed information, particularly with regard to the events in the house while the police were waiting outside it. I refer to the conduct of the accused in trying to destroy the blocks of morphine. This information could only have come from one who was directly implicated in the offence charged. It was also information subsequently confirmed by the testimony of Inspector Lai who saw the accused running from the direction of the toilet and had testified as to the discovery of the blocks of morphine amidst the burning newspapers in the toilet. There was thus corroboration of the cautioned statement of the most cogent kind implicating the accused with the offence charged: see *R* v *Baskerville*.[4]

I must next touch upon the testimony of the government chemist, Mr Sim Hock Lye. Briefly, he testified that on 6 January 1983, he had received the two blocks of morphine (exhs P7 and P8) and the sack of soda (exh P10) from ASP Lim at the Department of Chemistry, Georgetown.

He carried out a detailed and well reasoned analysis of P7 and P8 and found them to contain 2,213g of morphine, a dangerous drug within the meaning of the Dangerous Drugs Act 1952. He added that heroin was made from morphine, also a dangerous drug.

This witness was subjected to severe cross-examination by counsel for the defence with a view to establishing that the samples taken from the two blocks were not truly representative of them and so the results of the test carried out on those samples were faulty. The chemist gave convincing replies to this attack which appear fully in the note I took of his testimony. He was confident that the samples taken were truly representative of the two blocks and he gave his reasons for that conclusion. He was also a competent witness being suitably qualified with a wealth of practical experience and his evidence was uncontradicted. In the circumstances, I regarded his testimony as sufficient to establish that P7 and P8 contained 2,213g of morphine, a dangerous drug within the meaning of the Dangerous Drugs Act 1952, and I accepted it.

As regards the owner of the house, Chan Yee Pin (PW8), it was true that there were apparent discrepancies in his evidence as to the date when the iron grill was installed but he was consistent about it having been installed before the first lease dated 12 March 1982 (P14) was signed. This would be before the house was raided. In any event, his evidence was corroborated by ASP Lim who was sure that he saw the grill during the search of the house on 5 January 1983. There was also the cautioned statement of the accused wherein he admitted that he was alone in the house at the time the police struck, so whether or not the grill was in existence at the time of the police raid mattered not one bit. It will be recalled that the line taken by counsel for the defence during the cross-examination of the police witnesses was that when the police struck, Ah Hock was present in the

house with the accused, that the drugs were solely possessed by him (Ah Hock) and that he managed to make good his escape from the house through the air well. At the close of the prosecution case, there was not a speck of evidence to support any of these suggestions. Nevertheless, I kept an open mind on the matter for I had yet to hear the defence case.

In these circumstances, at the close of the prosecution, I indicated to counsel that I did not wish to hear a submission of no case to answer as I was clearly of the opinion that the prosecution had tendered sufficient evidence which, if unrebutted, would have warranted the conviction of the accused as required under s 182(f) of the Criminal Procedure Code. Counsel, nevertheless, formally submitted that there was no case to answer and I made a note of that in the record of the proceedings.

Before I embark upon a consideration of the defence case, there are two matters I should like to deal with.

Firstly, although it is implicit in ss 182, 197 and 217 of the Criminal Procedure Code ('the Code'), that in trials before the High Court, whether without or with assessors, or by jury, there is no requirement for the court to hear a submission of no case to answer, in practice, the court frequently does: see *PP* v *Parnaby*.[5] I was, however, of the view that I had a discretion in the matter and I chose to exercise it by declining to hear a submission of no case to answer by counsel having regard to the strength of the case for the prosecution.

Secondly, the question what test a court should apply in ruling whether or not there is a case to answer is not free from difficulty. Prior to the now celebrated Singapore Privy Council case of *Haw Tua Tau* v *PP*,[6] except in the case of jury trials, where s 214(i) of the Code authorizes the court, at the close of the case for the prosecution, to direct the jury to return a verdict of not guilty only 'if it considers there is *no evidence* that the accused committed the offence' (emphasis mine), in all other criminal trials, whether in the summary court or in the High Court, having regard to the differently worded provisions of ss 173(f), 180 and 190 of the Code, the sole question the court had to ask itself at that stage of the proceedings was: whether, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone. If so, then no prima facie case has been made out and the accused should not be called for his defence: per Gordon-Smith Ag JA in *PP* v *Chin Yoke*.[7] This test had been consistently applied by judges throughout this country; see for example, *PP* v *Lim Teong Seng & Ors*[8] and *Zahari bin Yeop Baai* v *PP*.[9]

Then came the case of *Haw Tua Tau* v *PP*[6] and there Lord Diplock appears to have taken a different view for he said, in explicit terms, that save in a situation where the evidence tendered by the prosecution 'was so inherently incredible that no reasonable person could accept it as true to prove any one or more of the essential elements of the offence', it would be premature for the court to assess the accuracy of the prosecution evidence at the close of the prosecution case for to do so would run counter to the concept of what is a fair trial under the adversarial system of criminal trials to which we subscribe. The trier of fact would thus have to keep an open mind about the veracity and accuracy of recollection of witnesses, whether for the prosecution or the defence, until *all* the evidence tendered by both sides have been heard and submissions made thereon.

For convenience, I shall reproduce the relevant passages in Lord Diplock's judgment:

> The proper attitude of mind that the decider of fact ought to adopt towards the prosecution evidence at the conclusion of the prosecution case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided, questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect could be a conditional verdict of guilty before the accused had any opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness, jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.
>
> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is

he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

In *A Ragunathan* v *PP*,[10] the then Federal Court which comprised Raja Azlan Shah Ag LP, Salleh Abas and Abdul Hamid FJJ (as they then were) gave its stamp of approval to the test propounded by Lord Diplock in *Haw Tua Tau*.[6] The relevant passage in the judgment of the court at p 141 col 2 F-G reads as follows:

Applying that principle, the learned magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the applicant is guilty as charged.

However, in the recent case of *Munusamy* v *PP*,[11] a decision of the Supreme Court, it was a specific ground of appeal that the trial judge had erred in accepting the credibility of witnesses for the prosecution at the close of the case for the prosecution, contrary to the principles enunciated in *Haw Tua Tau* v *PP*,[6] referred to with approval in *A Ragunathan* v *PP*.[10] The ground of appeal was rejected; the court held that it was not wrong for the judge to have done so and that *Haw Tua Tau*[6] merely stated in different words what had earlier been said in *PP* v *Chin Yoke*.[7]

Tan Sri Professor Ahmad Ibrahim in an erudite article entitled 'The Burden At The End Of The Prosecution Case – *Haw Tua Tau* Revisited', reported in [1987] 2 MLJ lxx, has observed that *Munusamy* v *PP*[11] has placed *Haw Tua Tau*[6] in its proper perspective though it was a little unfortunate that the court had retreated somewhat from its position when it said, at the end of the judgment (at p 498):

In our opinion, if he (ie the learned trial judge) had dealt with the accuracy of the testimony, he merely erred in favour of the appellant in placing too high a burden on the prosecution before calling for the defence.

I confess to having been placed in a dilemma as to what test to apply in the present case in view of the state of the authorities to which I have referred.

The conclusion I had reached was that whichever test I applied, whether that laid down in *Haw Tua Tau* v *PP*[6] or that laid down in *PP* v *Chin Yoke*,[7] I was completely satisfied, in the words of s 182(f) of the Criminal Procedure Code, that the prosecution had adduced sufficient evidence which if unrebutted would warrant a conviction.

If it was not open to me to assess the credibility and accuracy of the recollection of the witnesses for the prosecution at the close of the case for the prosecution, having regard to the principles enunciated in *Haw Tua Tau* v *PP*,[6] then there was in my opinion sufficient prima facie evidence having regard to the testimony of members of the raiding party, especially that of Inspector Lai, to show that the accused was in possession of the two blocks of morphine at the time and place mentioned in the charge and as their combined weight (being 2,213g) was far in excess of the statutory minimum of 200g then provided for in s 37(1)(da)(ii) of the Dangerous Drugs Act 1952, the presumption that he was a trafficker in the same until the contrary was proved arose. The onus was therefore upon him to rebut the same.

If, on the other hand, it was open to me to assess the credibility and accuracy of recollection of the prosecution witnesses at the close of the case for the prosecution, then I wish to make it clear that their testimony inspired confidence for they stood up well to long and searching cross-examination and I could find nothing improbable in what they had testified to.

Upon his defence being called, the accused elected to give sworn testimony.

He recalled how he was awakened by the police at about 6 am on 5 January 1983 when he heard the shaking of the iron grill to the front door of his house and a voice calling out, 'We are government men, open up.' On opening the door, he recalled seeing Inspector Lai who identified himself by producing his authority card and asked that the door be opened to enable a search to be conducted. So he told Inspector Lai to wait while he went to fetch the key. He then went to the dining hall where the key was usually kept. As he passed the second bedrom, Ah Hock popped his head out of it and asked who was at the door. The accused replied that they were government men. Whereupon Ah Hock said, 'Don't open the door.' Notwithstanding this injunction, the accused said he looked for the key. As he did so, Ah Hock came running out of his room with newspapers in his hand towards the toilet. In the meanwhile, the accused, having failed to find the key in the hall went into the first bedroom to look for it but once again failed to discover it. As he came out of the first bedroom, he heard noises above the ceiling in Ah Hock's room. Ah Hock then emerged from his room, so the accused asked him for the key to the front door grill. Ah Hock's response was, 'Don't care about the key; don't open the door.' Without further

ado, Ah Hock then ran to the air well, propped up a ladder against the wall in the air well and climbed up towards the roof. At this point, the accused lost sight of him.

The next thing that happened was that the accused saw smoke coming from the toilet. So the accused went to the toilet to investigate and saw newspapers burning in it. At the same time he heard the grill being violently shaken. The police had then broken down the grill and rushed into the house.

Inspector Lai then caught hold of the accused who was then at the door of Ah Hock's room and questioned him about Ah Hock, whereupon the accused pointed his finger towards the direction of the ladder. Inspector Lai then slapped, punched and kicked the accused.

The accused claimed that he had no knowledge of the two morphine blocks P7 and P8.

Under cross-examination, he said that although there were two sets of keys to the house, one set was kept in his younger sister's home, which was close by, and the other set was shared between him and Ah Hock.

He also said that he first came to know Ah Hock in October 1982 when the latter moved into the house. He added that Ah Hock had two houses of his own – one in Fettes Park and the other in Minden Heights.

He was confronted with various passages in his cautioned statement which were inconsistent with his evidence. I need not deal with these seriatim for they will appear sufficiently from the note I took of the proceedings. It will suffice if I say that the gist of the explanation by the accused for these contradictions was that the offending passages in his cautioned statement did not represent what he had in fact said to the recording officer.

I must now assess the testimony of the accused. It goes without saying that if I believed the version given by members of the raiding party and, in particular that of Inspector Lai, then the defence of the accused must necessarily fail, for on that version, it was clear that the accused was literally caught red-handed, alone in his house, rushing out from the direction of the toilet after having made an unsuccessful attempt to destroy the two blocks of morphine, P7 and P8, the subject matter of the charge.

There was also, clearly, on that version, as I have already observed, evidence of manual possession on the part of the accused of the two blocks of morphine sufficient to attract the presumptions of trafficking by virtue of s 37(d) and (da) of the Act.

I was completely satisfied that the testimony of members of the raiding party was that of witnesses of truth. They were subjected to long and searching cross-examination by counsel and yet remained unshaken and unbroken. However, I recognized that this fact alone was not per se an all-sufficient acid test of credibility and that the inherent probability or improbability of a fact in issue must be the prime consideration (per HT Ong FJ in *Muniandy* v *PP*[12] at p 258).

There were certain obvious unsatisfactory features in the evidence of the accused which I propose to touch upon.

The gist of the defence of the accused was that he was a victim of circumstances and that the case against him had been framed by the police. In particular, he alleged that he had no knowledge of the presence of the drugs in his house and that it was Ah Hock who had brought them there and had managed to escape through the air well under the very noses of the police, thus leaving him to carry the can.

The testimony of the members of the raiding party shows that the accused was the only person in the house at the time they struck. Furthermore, that testimony shows that Ah Hock could not have made good his escape from the house through the air well without attracting their attention.

The testimony of the investigating officer, ASP Lim, and that of the owner, which I accepted, showed clearly that at the material time there was a built-in grill in the air well which would have made it humanly impossible for any adult to have escaped from the house through the air well. I was satisfied that the attempt by the accused to pass the buck to Ah Hock was a red herring and a recent invention.

There was also the cautioned statement of the accused which was materially different to the version put forward by him in court for in it he had admitted knowledge of the two bricks of morphine, which he said were brought into the house by Ah Hock on 1 January 1983. He had also admitted that at the time of the police raid he was alone in the house. The credit of the accused was clearly impeached by his cautioned statement. I would repeat that I was satisfied that the contents of the cautioned statement are an authentic record of what the accused had said having regard to the testimony of the recording officer which I accepted. The latter was cross-examined at great length but without any success and I found nothing improbable in his testimony.

I might also mentiom that counsel for the accused had recalled the investigating officer, ASP Lim, and cross-examined him with a view to establishing that certain documentary evidence, allegedly the driving licence of Ah Hock, had been seized by him during the raid and deliberately suppressed. This was stoutly denied by ASP Lim and I had no reason to disbelieve him.

I did consider, with the utmost care, every aspect of the evidence tendered by the prosecution and the defence and the submissions thereon. It is fundamental that it is not for the defence to prove anything and that all that is required of it is to render an explanation which is reasonable and probable and which casts a doubt either as to the truth of the prosecution or as to the guilt of the accused. I unhesitatingly reached the conclusion that the explanation of the accused did not meet these requirements.

I was completely convinced, for the reasons stated, that the explanation of the accused, far from rebutting the presumption of trafficking under s 37(da), went to reinforce it.

As to sentence, when considering the evidence before arriving at my verdict, I gave this matter my fullest consideration, this being a pre-amendment offence and so I had a discretion to impose either life imprisonment or death. Although the accused had three previous convictions for armed robbery, I did not treat this as of decisive importance though it was admittedly a relevant factor to be considered. However, the quantity of the drugs involved in the commission of the offence was very considerable.

I could, therefore, find no extenuating circumstances which could justify my showing mercy. Accordingly, I found the accused guilty of the offence charged, convicted him and sentenced him to death.

Order accordingly.

Solicitors: *Kumar & Co.*

Reported by *Prof Ahmad Ibrahim*

Rohaya bte Mohd Majzub & Ors v Government of Malaysia

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO 31-21-1987
HARUN J
23 JUNE 1988

Labour Law – Revision of salaries in the public service – Public Service Tribunal set up to resolve anomalies – Implementation of Tribunal's award – Plaintiffs allege being placed on wrong salary scale – Public Service Tribunal Act 1977, ss 2, 4 & 15

The plaintiffs in this case were Broadcasting Assistants Grade I in the Department of Broadcasting. They were appointed on diverse dates between 1980 to 1981 and claimed that they had been placed on the wrong salary scale.

On 1 July 1977 the government implemented Cabinet Committee Report No 1 effective from 1 January 1976. This report revised the salary in the public service. The second revision took effect on 1 July 1980 under Cabinet Committee Report No 2. Anticipating anomalies by these revisions the government established the Public Service Tribunal to determine any dispute in regard to such anomalies. The gist of the present case was that the Broadcasting Assistants Grade I who were appointed on 1 January 1976 were placed on the B9 salary scale. The plaintiffs claimed for emplacement on the B3 salary scale. The difference in the two scales with effect from 1 July 1980 was (a) B3: $1505-$1685 and (b) B9: $745-$1505. The pre-1976 Broadcasting Assistants Grade I were emplaced on the B1, ie $1685-1865, salary scale by an award of the Public Service Tribunal handed down on 12 August 1981. The last para of the award read as follows: 'We rule that Broadcasting Assistant Grade I be given the salary scale of B1: $1585-$1765 on a personal-to-holder basis specially for those holding that post before 1 January 1976; and the B3 salary scale of $1405-$1585 for those appointed on or after that date, both with effect from 1 January 1976.'

The government implemented the first part of the award in respect of Broadcasting Assistants Grade I appointed before 1 January 1986 but did not implement the second part of the award in respect of the 66 plaintiffs.

Held, granting the reliefs in terms of the originating summons:

(1) The tribunal dealt with the anomaly affecting Broadcasting Assistants Grade I as a whole and not the pre-1976 officers in isolation. The award was made on 12 August 1981 and on that date all the 66 plaintiffs were already in employment as Broadcasting Assistants Grade I. It therefore followed that the tribunal intended that the award should apply to the plaintiffs.

(2) The plaintiffs were 'public officers' as defined in s 2 of the Public Service Tribunal Act 1977 ('the Act') and nowhere in the Act did it say that it applied only to public officers who were in employment at the time of the implementation of the Cabinet Committee Report No 1. It followed therefore that the plaintiffs were not bound by the salary offered them in their respective letters of employment.

(3) By s 15(1) of the Act the decision of the tribunal on any anomaly referred to it was final and conclusive and binding on the government.

(4) There was no ambiguity on the award and it applied to all Broadcasting Assistants Grade I who held the post on the date of the award with effect from the date of their respective appointments or promotions.

Legislation referred to
Public Service Tribunal Act 1977 ss 2, 4, 15

KP Gengadharan (*N Mahalingam* with him) for the plaintiffs.

PM Mahalingam (Senior Federal Counsel) for the defendants.

Cur Adv Vult

Harun J: The plaintiffs are Broadcasting Assistants Grade I in the Department of Broadcasting. They were appointed on diverse dates between 1980 and 1981. They claim that they have been placed on the wrong salary scale.

On 1 July 1977, the government implemented Cabinet Committee Report No 1 with effect from 1 Janu-